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SERVICE DATE - OCTOBER 23, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33561

PORT OF PEND OREILLE D/B/A PEND OREILLE VALLEY RAILROAD—ACQUISITION  
AND OPERATION EXEMPTION—THE BURLINGTON NORTHERN AND SANTA FE  
RAILWAY COMPANY

Decided: October 20, 1998

On February 20, 1998, Port of Pend Oreille d/b/a Pend Oreille Valley Railroad (POVA) filed a verified notice of exemption under 49 CFR 1150.41 from the provisions of 49 U.S.C. 10902 to acquire the exclusive rail freight easement and all track structures on a 24.9-mile rail line of The Burlington Northern and Santa Fe Railway Company (BNSF).<sup>1</sup> Notice of the exemption was served and published in the Federal Register (63 FR 11707) on March 10, 1998. The exemption became effective on February 27, 1998, 7 days after the verified notice was filed, and POVA was to begin operations on or after March 1, 1998.<sup>2</sup> John D. Fitzgerald, for and on behalf of United Transportation Union-General Committee of Adjustment GO 386 (Fitzgerald), filed a petition to revoke the exemption and for discovery in this proceeding on April 9, 1998.<sup>3</sup> Upon completion of

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<sup>1</sup> The rail line is located between milepost 1433.0, at Newport, WA, and milepost 1408.1, at Dover, ID (Newport/Dover line). In conjunction with the acquisition of the rail freight easement and track structures, POVA also acquired incidental overhead trackage rights over BNSF's 6.9-mile rail line between milepost 1408.1, at Dover, ID, and milepost 1401.2, at North Sandpoint, ID.

<sup>2</sup> BNSF retained ownership of the real estate underlying the rail line that was acquired, and POVA became the exclusive operator of the rail line.

<sup>3</sup> Fitzgerald also sought to have the POVA notice of exemption rejected. As noted above, the exemption became effective on February 27, 1998, and Fitzgerald had not asked the Board to stay the effectiveness of the exemption. Once an exemption becomes effective, the proper method to challenge the exemption is a petition for revocation pursuant to 49 U.S.C. 10502. See Portland & Western Railroad, Inc.—Lease and Operation Exemption—Lines of Burlington Northern Railroad Company, STB Finance Docket No. 32766, slip op. at 3 (STB served Feb. 24, 1998). We have considered the basis for the rejection request--Fitzgerald's argument that the transaction is outside the scope of the class exemption at 49 CFR 1150.41--in considering whether to revoke the exemption.

discovery, Fitzgerald filed a supplemental petition on May 26, 1998.<sup>4</sup> On June 10, 1998, POVA filed a reply. This decision declines to revoke the exemption in this proceeding.

### DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10502(d), we may revoke an exemption if we find that regulation of the transaction at issue is necessary to carry out the rail transportation policy of 49 U.S.C. 10101. The party seeking revocation has the burden of proof and petitions to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted and regulation of the transaction is necessary. See CSX Transp., Inc.--Aban.--In Randolph County, WV, 9 I.C.C.2d 447, 449 (1992); I&M Rail Link, LLC--Acquisition and Operation Exemption--Certain Lines of Soo Line Railroad Company D/B/A/ Canadian Pacific Railway, STB Finance Docket No. 33326 et al., slip op. at 6 (STB served Apr. 2, 1997).

#### Nature of Interest Acquired.

Fitzgerald argues that an easement is not a sufficient interest to qualify as a line acquisition under 49 U.S.C. 10902 and thus is not embraced within the class exemption at 49 CFR 1150.41. Fitzgerald claims that the exclusive rail easement over the right-of-way that POVA obtained is a non-possessory interest. Fitzgerald further claims that POVA will not operate the line between Newport and Dover, that POVA is merely an agent of BNSF, and that all operating decisions are made by BNSF.

POVA responds that BNSF transferred all of its interest in the rail line to POVA except for the underlying real estate. Thus, POVA acquired all of the tracks, track materials and related track structures and facilities on the rail line. POVA further states that, when it acquired the exclusive rail service easement, it became the exclusive operator of the line, with all of the common carrier rights and obligations that are associated with that operation. POVA maintains that it is not necessary to acquire a full fee simple title to a rail line to be covered by section 10902. It notes that section 10902 expressly encompasses transactions involving only the operation (and not necessarily the ownership) of an extended or additional rail line.<sup>5</sup> Thus, had POVA simply sought to operate the rail line without obtaining any incidents of ownership, the transaction would have qualified for the section 10902 class exemption.

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<sup>4</sup> The May 26 petition supersedes the April 9 petition.

<sup>5</sup> Under section 10902, a Class II or Class III rail carrier “. . . may acquire or operate an extended or additional rail line . . . only if the Board issues a certificate authorizing such activity . . . .”

We agree that the terms “acquire” and “operate” apply to interests in railroad lines that are less than a fee simple ownership, such as a lease or a right to operate.<sup>6</sup> Indeed, the term “acquisition” as used in section 10902 and the class exemption from the operation of that section embrace all forms of operating interests in a rail line. See Acquisition of Rail Lines Under 49 U.S.C. 10901 and 10902—Advance Notice of Proposed Transactions, STB Ex Parte No. 562, slip op. at 1 n.1 (STB served Sept. 9, 1997). Thus, the class exemption for 10902 transactions embraces the exclusive rail freight easement acquired by POVA over this rail line. (We also agree with POVA that, even if the transaction were not viewed as an acquisition, the operation of the line would still come within 49 U.S.C. 10902 and within the class exemption at 49 CFR 1150.41.)

Arm’s-Length Arrangement.

Fitzgerald contends in his petition that BNSF created POVA as a wholly dependent entity to service BNSF customers, and that BNSF retained the key decision-making responsibilities, such as car supply, rates, routes, and the right to terminate the arrangement.

POVA denies that it is merely an agent of BNSF. POVA states that it is neither owned by, nor affiliated with, BNSF. (The parties have no officers or directors in common.) POVA is a municipal corporation of the State of Washington that was formed in 1978 to acquire and operate the former Chicago, Milwaukee, St. Paul and Pacific Railroad Company rail line between Newport and Metaline Falls, WA.<sup>7</sup> According to POVA, the purpose of the transaction at issue here was to extend POVA’s operations to add more traffic and enable POVA to make its overall operations profitable, while at the same time relieving BNSF from the obligation of providing service on a line that for BNSF was marginal at best. In addition, POVA sought to prevent the possible sale of the Newport to Dover line to another carrier, which would have landlocked POVA’s branch line and placed POVA at the mercy of that carrier.

POVA acknowledges that BNSF will provide dispatching directions between Dover and North Sandpoint, because POVA merely has overhead trackage rights over that BNSF line segment to permit POVA to interchange traffic with BNSF at the North Sandpoint rail yard. In contrast, POVA itself will perform all dispatching on the Newport to Dover line. BNSF will continue to be responsible for car supply and the establishment of through rates for all interline traffic moving to and from the Newport to Dover line. However, POVA submits that such arrangements are common in the industry, that they are included in most line sales to Class III rail carriers, and that virtually all short lines are dependent on their Class I connections for car supply. (The ability to quote through rates provides substantial benefits to both of the carriers involved as well as their customers.) Finally, POVA explains that BNSF can only terminate the minimum 20-year term of the exclusive

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<sup>6</sup> See Class Exemption-Acq. & Oper. of R. Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810 n.1 (1985) (Class Exemption - 10901).

<sup>7</sup> See Pend Oreille Valley R., Inc.--Operate--Chicago, 360 I.C.C. 636 (1980).

service easement at an earlier date if BNSF returns to main line service the former Great Northern line between Newport and Spokane, WA.

We are not persuaded, on this record, that the relationship between POVA and BNSF is anything but a bona fide arm's-length arrangement between a small railroad and its connecting mainline carrier.

Other Arguments.

Finally, Fitzgerald contends that regulation of this transaction is necessary to encourage fair wages and safe and suitable working conditions in the railroad industry [49 U.S.C. 10101 (11)], to promote efficiency [49 U.S.C. 10101(3) and (9)], to ensure a sound system [49 U.S.C. 10101(4) and (5)], and to encourage honesty [49 U.S.C. 10101(9)]. In support of its position, Fitzgerald charges that three BNSF positions have been lost as a result of the POVA operations,<sup>8</sup> that this transfer of work is not in the national interest where there is no truly genuine public benefit, and that it is inefficient to franchise a separate organization to perform these operations.

POVA counters that, as a locally based carrier, it will be able to provide more efficient, economical and attentive service to the customers on the line, thus leading to improved service at lower rates for existing and potential shippers. It maintains that this is the very type of transaction that the Board and its predecessor, the Interstate Commerce Commission, have repeatedly endorsed.

We are satisfied, on the record before us, that there are public interest benefits to the arrangement and that the arrangement is not a mere subterfuge designed solely to displace BNSF employees.

In sum, having reviewed all of the evidence and arguments presented by the parties, we find no basis for revocation. Fitzgerald has failed to demonstrate that regulation of this transaction is needed to carry out the rail transportation policy.

This decision will not significantly affect the qualify of the human environment or the conservation of energy resources.

It is ordered:

1. Fitzgerald's petition is denied.

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<sup>8</sup> Because POVA is a Class III railroad, no employee protective conditions are available upon the transfer of the line to it.

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2. This decision is effective on its date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary